FEB 4

In The

Supreme Court of the United States

October Term, 1974

No. 74-825

MERCY N. CLINCHER, ET AL., *Petitioners,*

-vs-

THE UNITED STATES AND THE STATES OF ARIZONA AND MONTANA, *Respondents.*

Respondents' Brief in Opposition

TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Court of Claims, not reported, appears in the appendix of Petitioners' Petition. The Order of the Court amending the opinion, not reported, appears in the appendix of Petitioners' Petition.

STATEMENT OF THE CASE

Plaintiffs are seven American Indians suing on their own behalf and on behalf of all other American Indians similarly situated on Indian Reservations in the state of Montana and in other states of the Union, seeking recovery of moneys earned by plaintiffs for services performed as employees of the United States on designated Indian Reservations. The moneys were withheld by the United States from Plaintiffs' wages pursuant to the Withholding Act of 1952, infra, and paid over to either the state of Montana or the state of Arizona for income taxes claimed by the states.

The United States inter-pleaded as third party Defendants the states of Arizona and Montana. The Indians and United States each moved for Summary Judgment with the United States also praying that any Judgment against it be made a Judgment against the two states. The states moved to dismiss.

The Court of Claims granted the Motions of the United States and the states and dismissed the case. The Indians moved for a rehearing and the Motion was denied.

REASONS FOR DENYING THE WRIT

A. The holding of the Court of Claims does not undercut the decision of this Court in McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973)

Answering Petitioners' first reason for granting the Writ, i.e., that the holding of the Court of Claims undercuts the decision of this Court in *McClanahan v. Arizona*

State Tax Commission, 411 U.S. 164 (1973), the Court of Claims properly decided that whether or not individual Indians are subject to state taxation was not the issue to be decided. The question before the Court of Claims was whether or not the United States should be liable for withholding taxes that might ultimately be found to have been not collectible by the states. The controlling law is to be found in 5 U.S.C. §5517 (Codifying the Withholding Act of July 17, 1952, ch. 940, 66 STAT. 765, as amended by the Act of September 6, 1966, ch. 55, 80 STAT. 478-79) which provides as follows:

"§5517. WITHHOLDING STATE INCOME TAXES

(a) When a State statute—

(1) provides for the collection of a tax by imposing on employers generally the duty of withholding sums from the pay of employees and making returns of the sums to the State; and

(2) imposes the duty to withhold generally with respect to the pay of employees who are residents of the state;

The Secretary of the Treasury, under regulations prescribed by the President, shall enter into an agreement with the State within 120 days of a request for agreement from the proper State official. The agreement shall provide that the head of each agency of the United States shall comply with the requirements of the State withholding statute in the case of employees of the agency who are subject to the tax and whose regular place of Federal employment is within the State with which the agreement is made. * * *

(b) This section does not give the consent of the United States to the application of a statute which imposes more burdensome requirements on the United States than on other employers, or which subjects the United States or its employees to a penalty or liability because of this section. An agency of the United States may not accept pay from a State for services performed in withholding State income taxes from the pay of the employees of the agency."

As is evident from subsection (b) of the statute, Congress could not have intended this provision to be interpreted so as to impose a greater burden on the United States than that imposed on a private employer. The Court properly held the United States not liable for withholding of the moneys in question when a private employer could not be under either Arizona or Montana law. Such liability is expressly eliminated by Arizona Revised Statutes §43-188 (g), and Revised Codes Montana §84-4947:

Ariz. Rev. Statutes, §43-188

"(g) Liability for failure to withhold; penalty for failure to remit.

(1) The employer shall be liable to the tax commission for the payment of the tax required to be deducted and withheld under this section, and the employee shall not thereafter be liable for the amount of any such payment, *nor shall the employer be liable to any person or any employee for the amount of any such payment.* For the purpose of making penalty sections of this title applicable, any amount deducted or required to be deducted and remitted to the commission under this section shall be considered the tax of the employer and with respect to such amounts he shall be considered as a taxpayer. *(Emphasis supplied).*

Rev. Code of Montana, §84-4947

"84-4947. Amount withheld considered as tax collected. All amounts deducted and withheld shall be considered as a tax collected under the provisions of this act, and *no employee shall have any right of action against his employer in respect to any moneys so deducted and withheld from his wages* and paid to the state of Montana in compliance or intended compliance with this act." *(Emphasis supplied.)*

B. *This case presents an important question of general application to a substantial segment of American Indians.*

To be sure, however, the decision of the Court of Claims, by recognizing the requirement imposed upon the United States by 5 U.S.C. §5517, supra, to withhold sums from the compensation of employees, in no way interferes with the preferential right of employment of Indians nor their right to be free from state taxation. The decision below does not say they are denied relief in this regard, but only that their remedies, if any, must be commenced in the proper forum, i.e., their respective state courts. The Plaintiffs have ample opportunity to contest any state taxes they deem improper by pertinent statutes of Montana and Arizona. In granting the third party Defendants' states of Arizona and Montana Motions to Dismiss, the Court of Claims properly recognized its lack of jurisdiction with respect to determining the liability of Indians to state taxation in that Plaintiffs have totally failed to embark upon and exhaust their administrative remedies in the states of Montana and Arizona. An aggrieved taxpayer under Montana income tax laws may apply to the State Department of Revenue and may appeal its decision to the State Tax Appeals Board under §84-4922, R.C.M. 1947. Any decision rendered by the Department of Revenue may be reviewed by a Montana District Court and the Montana Supreme Court under §84-4923.1, R.C.M. 1947. In addition, under the provisions of §84-4502, R.C.M. 1947, a taxpayer may pay his Montana individual income taxes under protest and thereafter bring an action in Montana Courts for determination of all issues. Finally, the Montana income taxpayer may bring a declaratory action in a Montana District Court under §93-8901, R.C.M. 1947, on any rights asserted under this Complaint. All of the decisions rendered by Montana District Courts may be appealed to the Supreme Court of Montana, and any issue properly raised to the Supreme Court of Montana is subject to final review by the United States Supreme Court. Federal Courts have held that state remedies like those of the State of Montana, provide a plain, speedy and efficient remedy. *Abernathy v. Carpenter*, W.D. Mo. (1962), 208 F. Supp. 793, aff'd 373 U.S. 241, 83 S.C. 1295, 10 L. Ed. 2d

409 1963); *Gray v. Morgan*, 7th Cir. (1966), 371 F. 2d 172, Cert. denied 386 U.S. 1033; *Bussie v. Long*, 5th Cir. (1967), 383 F. 2d 766; and *Great Lakes Dredge and Dock Co. v. Huffman*, 319 U.S. 293, 63 S.C. 1070, 87 L. Ed. 1407 (1943). The Supreme Court in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 542, fn 6, has specifically recognized that Congress does not favor Federal judicial interference with enforcement of state tax laws, and has repeatedly barred anticipatory Federal adjudication of the validity of state tax laws.

C. The decision of the Court of Claim is erroneous and ignores the Buck Act and misapplies the Withholding Act.

The Court below properly concluded "what we have here is a case where the collection of a refund of any excess of withholding over tax liability is entirely between the taxpayer and the state." (Opinion below at 6 a). Neither the *Buck Act*, 4 U.S.C. §§101 et seq., nor *McClanahan v. Arizona State Tax Commission*, supra, were ignored by the Court. The *Buck Act* simply does not represent the controlling statutory language. The question to be decided by the Court was not whether the individual Indians were subject to the tax, or whether the states withheld taxes contrary to the holding in *McClanahan:* rather the Court properly focused on the issue in the case which was whether or not the United States should be liable for withholding amounts from the wages of Federal employees for state income taxes. In its decision, it properly interpreted and applied the Withholding Act (See 5 U.S.C. §5517 supra), concluding the United States to be not liable for withholding the moneys in question (See para. A above).

D. The Court of Claims erred when it relegated reservation Indians to state jurisdiction.

Plaintiffs' claim that they were deprived of the Court of Claims six year statute of limitations is to say they were deprived of a remedy to which they were never entitled. By granting third party Defendants' Motion to Dismiss

and holding that the matter was entirely between the taxpayer and the states, it is axiomatic that state statutes of limitations are controlling.

Petitioner's complaint that the Court of Claims holding will compel numerous Indians to initiate suits in more than one state is to completely ignore the cogent reasons behind the Court of Claim's decision to deny the petitioners a class action status. As the Court stated (opinion below at 2a). "It is certainly fairer to the members of the class not to invite them on board a sinking ship, * * *".

This Court's decision in *McClanahan*, supra, dealt with a specific reservation (Navajo), and a specific situation where the Indian that resided on the reservation was a member of that reservation, and earned money working on the reservation. All the named Plaintiffs in this case do not fit this description and several different reservations are involved. Thus, the possibility exists that some states will construe *McClanahan* more narrowly and put into issue different matters depending upon the state, the reservation involved, and the working and living situation of the particular Indian. Hence, the Court's decision to deny the request for class action status, properly reasoning that the normal and presently ongoing pursuit of refund claims before state agencies and Courts appeared cleaner, simpler and more economical.

SUMMARY

In summary, it is the contention of the Respondent, State of Montana, that:

(1) The Court properly granted judgment to the United States for the reason that the controlling statutes, both federal and state, relieve the United States, or any employer similary situated, from liability for withholding sums from the pay of employees and making returns of the sums to the state (5 U.S.C. 5517; Revised Codes of Montana §84-4947; Arizona Revised Statutes §43-188, supra).

(2) The Court properly granted the states of Arizona and Montana motions to dismiss for the reason that, in the absence of evidence that the Plaintiffs have exhausted their state administrative remedies, a Federal Court is precluded from granting them relief. *Gilchrist v. Interborough Rapid Transit*, 279 U. S. 159 (1929); *Porter v. Investors Syndicate*, 286 U.S. 461 (1932), aff'd on rehearing, 287 U.S. 346 (1932); *Carson v. Warlick*, 238 F. 2d 724 (4th Cir. 1956) cert. denied, 353 U.S. 910 (1957); *Baron v. O'Sullivan*, 258 F. 2d 336 (3d Cir. 1948). In the case at bar, the Plaintiffs have never filed a claim for a refund with either of the state taxing authorities. As stated by the Court (Opinion below at 6a), in both states a taxpayer is required to file a claim for refund with a state administrative taxing authority. A condition to a taxpayer's obtaining judicial review in both states is *inter alia* a denial of the taxpayer's claim for refund by the administrative taxing authority. Citing Ariz. Rev. Statutes §§43-184(b)(1), 43-186(b); Rev. Codes of Montana §84-4922, 84-4923.1.

CONCLUSION

For the foregoing reasons the State of Montana respectfully requests the Court to deny Petitioners' Application for Writ of Certiorari.

Respectfully submitted,



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